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8 UNITED STATES DISTRICT COURT
9 WESTERN DISTRICT OF WASHINGTON
AT TACOMA

10 RAY CHARLES HARRIS,

11 Plaintiff,

12 v.

13 MIGUEL BALDERAMA, et al.,

14 Defendant.

CASE NO. 3:16-CV-06054-BHS-DWC

REPORT AND RECOMMENDATION

Noting Date: December 22, 2017

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16 The District Court referred this action, filed pursuant to 42 U.S.C. § 1983, to United
17 States Magistrate Judge David W. Christel. On November 1, 2017, Plaintiff Ray Charles Harris
18 filed a Motion for Extension of Time. Dkt. 39. He subsequently filed his Motion for Voluntary
19 Dismissal and Waiver of the Filing Fee ("Motion"). Dkt. 41. Defendant Balderama filed his
20 Response stating he has no opinion and leaving the decision to dismiss to the Court's discretion.
21 Dkt. 42.

22 After review of the Motion and Response, the undersigned recommends the District
23 Court grant Plaintiff's Motion and dismiss his cause of action. However, the Court recommends
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1 his request to waive the filing fee be denied. The Court further recommends Plaintiff's Motion
2 for Extension of Time (Dkt. 39) be denied as moot.

3 **BACKGROUND**

4 Plaintiff filed this action in December of 2016. Dkt. 1. Defendants filed two Motions to
5 Dismiss (Dkts. 10, 14) which the Court granted (Dkt. 22). However, the Court provided Plaintiff
6 with leave to file an amended complaint. *Id.* Plaintiff filed his Amended Complaint in June of
7 2017. Dkt. 23. Defendants again filed two Motions to Dismiss (Dkts. 26, 27) which the Court
8 granted, again providing Plaintiff with leave to file an amended complaint (Dkt. 38). Plaintiff
9 then filed a Motion for Extension of Time, requesting the Court give him until December 20,
10 2017 to file another amended complaint. Dkt. 39. While that motion was still pending, Plaintiff
11 filed his current Motion, asking that he be allowed to voluntarily dismiss his action. Dkt. 41.
12 Defendant Balderama filed a response, stating he takes no position on whether the Court should
13 grant the Motion. Dkt. 42. The other named Defendants did not file a response.

14 **DISCUSSION**

15 Federal Rule of Civil Procedure 41 sets forth the circumstances under which an action
16 may be dismissed. Under Rule 41(a)(1), an action may be voluntarily dismissed without
17 prejudice by the plaintiff if the plaintiff files a notice of dismissal before the defendant files an
18 answer or summary judgment motion and the plaintiff has not previously dismissed an action
19 "based on or including the same claim." Fed.R.Civ.P. 41(a)(1); *Wilson v. City of San Jose*, 111
20 F.3d 688, 692 (9th Cir. 1997). Once the defendant has filed an answer or motion for summary
21 judgment, the action may only be dismissed by stipulation of dismissal signed by all parties who
22 have appeared or "by court order, on terms that the court considers proper." Fed.R.Civ.P.
23 41(a)(1), (2).

1 Here, dismissal is appropriate. Defendants have not filed an answer or a motion for
2 summary judgment. Rather, Defendants filed several Motions to Dismiss (Dkts. 10, 14, 26, 27)
3 which do not preclude a voluntary dismissal by Plaintiff. *See American Soccer Co., Inc. v. Score*
4 *First Enterprises*, 187 F.3d 1108, 1111 (9th Cir. 1999). Further, Plaintiff has not previously
5 dismissed an action based on the same claim. Finally, Defendant Balderama does not oppose
6 Plaintiff's Motion and the other Defendants have not filed responses to the Motion. Voluntary
7 dismissal is therefore appropriate. The Court recommends Plaintiff's action be dismissed without
8 prejudice.

9 However, the Court recommends Plaintiff's request to waive his filing fee be denied. 28
10 U.S.C. § 1915 does not provide any authority or mechanism for the Court to waive the payment
11 of a plaintiff's filing fee or to return the filing fee after dismissal of an action. "Filing fees are
12 part of the costs of litigation." *Lucien v. DeTella*, 141 F.3d 773, 775 (7th Cir.1998). Prisoner
13 cases are no exception. The Prison Litigation Reform Act ("PLRA") has no provision for return
14 of fees partially paid or for cancellation of the remaining fee. *See Goins v. Decaro*, 241 F.3d 260,
15 261–62 (2d Cir. 2001) (inmates who proceeded pro se and *in forma pauperis* were not entitled to
16 refund of appellate fees or to cancellation of indebtedness for unpaid appellate fees after they
17 withdrew their appeals). In fact, "[a] congressional objective in enacting the PLRA was to
18 'mak[e] all prisoners seeking to bring lawsuits or appeals feel the deterrent effect created by
19 liability for filing fees.'" *Id.* at 261 (quoting *Leonard v. Lacy*, 88 F.3d 181, 185 (2d Cir. 1996).
20 Having filed this case, Plaintiff and the Court are both statutorily limited by the strictures of 28
21 U.S.C. § 1915. Accordingly, to the extent Plaintiff is requesting the Court waive his filing fee,
22 the Court recommends his Motion be denied.

1 Finally, because the Court recommends Plaintiff's action be dismissed without prejudice,
2 the Court further recommends Plaintiff's Motion for Extension of Time (Dkt. 39) be denied.

3 **CONCLUSION**

4 For the foregoing reasons, the Court recommends Plaintiff's action be dismissed without
5 prejudice. The Court further recommends that Plaintiff's request to waive his filing fee and
6 Plaintiff's Motion for Extension of Time be denied. Pursuant to 28 U.S.C. § 636(b)(1) and Fed.
7 R. Civ. P. 72(b), the parties shall have fourteen (14) days from service of this Report to file
8 written objections. *See also* Fed. R. Civ. P. 6. Failure to file objections will result in a waiver of
9 those objections for purposes of *de novo* review by the district judge. *See* 28 U.S.C. §
10 636(b)(1)(C). Accommodating the time limit imposed by Fed. R. Civ. P. 72(b), the clerk is
11 directed to set the matter for consideration on December 22, 2017, as noted in the caption.

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13 Dated this 7th day of December, 2017.

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16 David W. Christel
17 United States Magistrate Judge
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